

法律效力作為法律存在的方式

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關鍵詞：效力、法律實證主義、自然法論、存在、本體論、知識論、倫理學、法律釋義學、法律解釋、法源、法律體系

Keywords：Validity, Legal Positivism, Natural Law Theory, Existence, Ontology, Epistemology, Ethics, Legal Doctrines, Legal Interpretation, Legal Source, Legal System

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摘要

法律是一個複雜的現象，從而用於描述法律之存在的概念「法律效力」亦是一個極為複雜、又屢遭批評的概念，以致於以「存在」之法律作為研究對象的法學也遭致許多困擾。這些批評或困擾，包括了循環定義、無限倒退或恣意終止的問題；法律與法學在本體論地位上的曖昧；語言的界線與法律體系成員的不確定性等。由於法律概念很難在現實世界中找到語意上直接的指涉，因此概念與規則的解釋往往涉及解釋者的意志或選擇，衍生了規則的衝突或可駁倒性，以及證成了法律原則的存在，從而法律體系的成員也變成不確定了。

透過 Savigny 與 Kelsen 兩大理論典範的對照，本文希望燭照出法律在本體論、知識論及方法論，與倫理學之間的複雜匯聚，以及與政治體制、正法理論之間的關係。最終提出三個可以作為未來進一步探究的方向：重新審視法律實證主義的理論初衷、從方法論上釐清法律實證主義的「實然」概念，並從實證主義之核心的經驗主義從新思考經驗、語言與真理的關係。

The Legal Validity as an Existential Way of Law

Liu, Tai-Chiang

Abstract

Generally speaking, whenever legal scholars define the concept of law, three elements are seldom forgotten: ethical element, sociological element and jurisprudential element. It is resulted from the fact: law is a so complicated phenomenon. Accordingly, the concept describing law's existence, namely, legal validity, suffers from many ambiguities and criticisms. Consequently, the doctrinal study of law, owing to the very object it explores, unescapably gets bogged down in deep embarrassments. In a few words, there are many divergences between legal theories and the real works of the doctrinal study of law.

This essay scrutinizes these embarrassments lurked in prevailing legal positivisms provided by John Austin, H. L. A. Hart and Hans Kelsen, such as: circularity in definition, vicious regress, arbitrarily stopping the question, ontological obscurity of law and legal doctrines, limits of language, and uncertainty of members of legal system. Since legal concepts have no direct semantic reference in real world, the interpretation of concepts and rules entails will or choice of interpreter. As a result, it derives the collision and the defeasibility of legal rules, and proves the existence of the legal principles. However the members of legal system become uncertain.

By contrasting two paradigms between Friedrich Carl von Savigny and Hans Kelsen, from legal sources to the legal methodology, the only right answer of legal interpretation, and the methodological nihilism, this essay hopes to review the complicated relations among ontology, epistemology (and methodology), ethics, political system and structures, and the theory of justice. Finally, this essay proposes three approaches for further studies: reexamining the original purpose of legal positivism, clarifying the "law as it is" from the view of methodology, and rethinking the relation among experience, language and truth from the perspective of empiricism as the core of positivism